



REPLY TO
ATTENTION OF:

Office of the Special Assistant
for Transportation Engineering

DEPARTMENT OF THE ARMY
MILITARY TRAFFIC MANAGEMENT COMMAND
TRANSPORTATION ENGINEERING AGENCY
720 THIMBLE SHOALS BOULEVARD, SUITE 130
NEWPORT NEWS, VIRGINIA 23606-2574
May 11, 2000



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Surface Transportation Board
Office of the Secretary
Case Control Unit,
ATTN: STB EX Parte No. 582 (Sub-No. 1)
1925 K Street, N.W.
Washington, D.C. 20423-0001

ENTERED
Office of the Secretary

MAY 16 2000

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Public Record

Dear Sir:

In accordance with your Advance Notice of Proposed Rulemaking dated March 31, 2000, the Military Traffic Management Command Transportation Engineering Agency provides the Department of Defense (DOD) written comments on your revision of Major Rail Consolidation Procedures. The 3.5-inch IBM-compatible floppy disk that is included with this letter contains the electronic copy of this written statement. The file name is mergcmt3.doc. The original and 25 copies of this notice are included for filing. If you have any questions concerning this filing please do not hesitate to call the undersigned at (757) 599-1163.

Sincerely,

Robert S. Korpanty, P.E.
Senior Engineer, Railroads
for National Defense Program

Enclosure

SURFACE TRANSPORTATION BOARD
STB Ex Parte No. 582 (Sub-No. 1)
MAJOR RAIL CONSOLIDATION PROCEDURES



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COMMENTS OF
THE
DEPARTMENT OF DEFENSE

16 MAY 2000

I. INTRODUCTION

These comments on behalf of the Department of Defense (DOD) are being submitted by the Military Traffic Management Command Transportation Engineering Agency (MTMCTEA), the agency responsible for the management and execution of the DOD Railroads for National Defense (RND) Program. The RND Program's mission is to integrate DOD requirements into civil sector rail plans. Together with the Federal Railroad Administration (FRA) of the Department of Transportation, we conduct periodic readiness reviews of civil rail lines important to National Defense.

Additionally, we work with the Military Services and Defense Agencies to identify the railroad corridors most important to DOD. This network is known as the Strategic Rail Corridor Network (STRACNET). It is the minimum integrated and inter-connected rail corridor network essential to meeting National Defense rail transportation needs, consisting of some 38,000 miles of main lines and connectors.

These comments respond to the request by the Surface Transportation Board (STB) for suggested revisions to the railroad merger evaluation criteria. DOD agrees that the current merger evaluation criteria set forth at 49 CFR Part 1180 do not encompass all of the issues appropriate for evaluation, particularly in the case of cross-border transactions. National Defense issues arising from potential international mega-mergers are very broad and complex. Therefore, DOD respectfully encourages the STB to incorporate the

criteria suggested below in its revised regulations to help ensure that National Defense issues receive appropriate consideration during the merger evaluation process.

The STB's Advance Notice of Proposed Rulemaking (ANPR) included a request for comments on nine specific issues. The ANPR also included an open-ended request for additional suggested modifications.

II. COMMENTS

A. Downstream Effects: DOD supports the STB's proposal to eliminate the "one case at a time rule." The accomplishment of DOD's mission requires assistance from all Class I carriers. Given the multi-carrier involvement in DOD missions, we recommend mergers of Class I railroads be evaluated for their competitive, financial, and operational impact on other Class I carriers, larger regional railroads, and shortlines serving critical DOD installations. The elimination of the "one case at a time" rule would allow DOD to comment on any adverse effects to National Defense interests arising from downstream responses by other carriers. If the strategic responses appear to be financially or operationally risky, the rule change would allow the STB to protect National Defense interests by fashioning a decision that minimizes potentially adverse effects on the railroad industry.

Relevant criteria for analyzing downstream effects include the following:

1. If the merging carriers' management teams were involved in other mergers, did the merging carriers accomplish their stated goals in prior merger proceedings? If not, how can the merger be conditioned to ensure that goals are met in the present transaction?
2. Same questions as (1) above for the responding carriers.
3. Timing and benchmarks for implementation and phasing of the initial and downstream transactions.

B. Maintaining Safe Operations: DOD agrees with the Board's intention to evaluate safety on a "case by case" basis. We do recommend that the Board, as part of its financial review of the proposed merger, consider whether the merging carriers have allowed sufficient funding under conservative estimates to pay for the requirements contained in their proposed Safety Integration Plan.

C. Safeguarding Rail Service: The STB should include criteria requiring the merging carriers to establish benchmarks for delivery schedules. The benchmarks should be prioritized -- reflecting different levels of on-time performance based upon the price or urgency of the service. The merging carriers should also substantiate how these benchmarks will be met or exceeded -- and the penalties they will accept in the event that the benchmarks are not attained. Quality rail service is critical for DOD to efficiently

deploy forces. For this reason, DOD is very concerned about post merger abandonments during a rail merger in addition to on-time delivery of material. Well-maintained track should be in place and carriers should provide service to deliver material when required.

D. Promoting and Enhancing Competition: DOD supports incorporation of the suggestions contained within the ANPR as appropriate means by which rail mergers could be used to promote and enhance competition in the rail industry. This competition is beneficial when the end result does not create monopolistic conditions. From DOD's perspective, carriers could enhance competition if their merger plans include shared access for new rail markets to and from DOD shipping points -- provided that the shared use includes an appropriate contribution towards maintenance of the infrastructure. This preserves the existing carrier's opportunity to retain pre-merger freight revenue while creating an opportunity for other carriers to compete for this traffic.

E. Shortline and Regional Railroad Issues: Thirty defense installations are served by short line and regional railroads. DOD supports criteria that require merging carriers to evaluate the impact of their transaction on the continued viability of these short and regional lines.

F. Employee Issues: The DOD encourages incorporation of criteria to review the issue of availability of employees for service. For example, if a carrier were to move its entire locomotive and car maintenance repair work to Mexico, it is essential that the National Defense interest of sufficient locomotives and cars, and personnel to maintain

them, be assured. The Board should consider whether the potential for maintenance work being moved across international borders can be justified in light of the potential degradation of the available resources to maintain the equipment fleet within the United States.

We also recommend the Board consider criteria for the review of centralized dispatching within the United States and equipment distribution using employees with labor contracts not subject to the jurisdiction of the Railway Labor Act (RLA). The RLA provides some predictability with respect to labor contracts. Since railroad labor contracts administered under the RLA do not expire, the parties are subject to negotiation, mediation, arbitration, and recommendation by a Presidential Emergency Board, as well as Congressional action. This often results in settlements that are satisfactory to the parties and beneficial to the economy. If trains or equipment are dispatched outside of the country, the employees performing the work are not subject to the jurisdiction of the RLA. The STB should therefore require the merging carriers to explain how they expect to mitigate the exposure of the United States rail system to service disruption arising from labor activities not subject to the RLA.

When an international merger is involved the STB should also consider a requirement for carriers to explain their plans for the administration of their predecessors' labor agreements. We understand that in the past, the Canadian carriers have maintained separate labor agreements for their U.S. subsidiaries. However, since it is operationally feasible to use employees from another country to perform tasks within the United States,

anything different from the status quo should be evaluated from the standpoint of its effect on the reliability of operations within the United States.

G. **“Three to two” Issues:** DOD has no comment.

H. **Merger Related Public Interest Benefits:** When merging carriers claim that the public interest, including defense interests, are supported by single line service, the merging carriers should be required to substantiate the expected improvements in service time and shipping rates associated with the merging carriers’ scenarios. The public interest may be served if the Board retained post merger oversight in its new rules to ensure that the parties follow through on the service claims being made.

I. **Cross-Border Issues:** In addition to DOD-unique concerns relating to foreign ownership or control of a U.S. rail carrier, DOD shares concerns voiced by the Department of Transportation and others regarding the effect such ownership or control may have on the maintenance and safety of U.S. rail lines. The degree to which the prospective owning or controlling foreign entity may be amenable to effective regulation by the FRA should be a key consideration of the STB. The effect of differing labeling, security, environmental, safety, labor, and other standards--possibly exacerbated by language differences--are but a few issues raised by a cross-border transaction. In addition, the likelihood of traffic being shifted from U.S. to foreign ports should also be considered. A significant shift in traffic could threaten the economic health of U.S. ports, eventually impacting the ability of those ports to meet National Defense needs.

J. National Defense Issues: The National Defense impact of a proposed merger should be considered by the STB in determining whether the merger should be approved. To this end, the National Defense ramifications of a proposed merger should be separately listed Consolidation Criteria in the STB's revised merger regulations. A review of this criterion should establish, at a minimum, that the merger would not degrade the carrier's ability and willingness to contribute to defense objectives and readiness. Specific areas of concern or factors to be considered should include, but not be limited to, the following:

1. The impact of the merger on maintenance to STRACNET lines under the control of the merging carriers.
2. The impact of the merger on traffic levels over STRACNET lines under the control of the merging carriers.
3. The specific plans for prioritization of DOD freight in the event of a war or other contingency.
4. The agreements in place, if any, between DOD and the merging carriers, addressing the provision of rail services to DOD in times of war or other contingency, and the impact the merger would have on those agreements. The STB should consider whether the merging carriers have established,

or are willing to establish, agreements with the DOD designed to ensure the carriers' rail services and equipment are available for the movement of DOD equipment and materiel in time of war or other contingency. This is particularly important that in the event the merger results in foreign ownership or control of a U.S. carrier.

5. Plans, procedures and/or agreements in place to ensure those routes, locomotives, rolling stock, and other equipment essential to the National Defense will be operated and adequately maintained after the merger.
6. The degree to which DOD traffic will be routed, as a result of the merger, over foreign rail lines, and the likelihood of assured access to such rail lines in time of war or other contingency.
7. In the event the merged carrier is owned or controlled by a foreign entity, the ability of that entity to sell its ownership or controlling interest to a third party without further regulatory review and approval. One specific concern is that a foreign owner acceptable to the STB and DOD may sell its interest to a foreign owner that is unacceptable, for financial, National Defense or other reasons.

III. CONCLUSION

The ability to rapidly deploy military forces by rail must be preserved in rail mergers. While DOD recognizes that the railroad industry should not be expected to subsidize the cost of capacity for National Defense interests, neither should the government or the shipping public be saddled with the burden of railroad consolidations that might compromise national security. Congress wisely retained the regulation of railroad mergers to ensure proposed mergers within the railroad industry consider all factors essential to a sound national transportation system. The time and resources spent now in the development of the relevant factors for the evaluation of international mega-mergers are unquestionably appropriate to the preservation of a competitive and responsive railroad industry in the years ahead.

The DOD appreciates this opportunity to comment -- and stands ready to assist the STB in fashioning more specific criteria during the natural progression of the rulemaking process.